

General Information Letter: Nexus issues are generally not suitable for resolution by letter ruling.

May 19, 2005

Dear:

This is in response to your letter dated April 22, 2005 in which you request a letter ruling. The following is in response to your request with respect to Illinois income tax. Your request with respect to sales and excise tax has been referred to the Sales Tax Division and will be addressed by a separate ruling. The nature of your request and the information provided with respect to Illinois income tax requires that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code § 1200.120(b) and (c), which may be accessed from the Department's web site at www.Iltax.com.

Your letter states as follows:

This letter is being written on behalf of my client to determine whether there is any instance of tax to which their business activity would be associated. I have reviewed the pertinent statutes and regulations and researched prior opinion or letter rulings and have found no circumstance similar to the activities of the client. I have also concluded that the level of activity within your state is insufficient to create a taxable presence. This request is being submitted to confirm our position or to inform us if there is something that may have been overlooked in the research. The client's activities are as follows:

CLIENT is a privately held wholesale data mobile access provider of airtime services to telematics, telemetry and machine-to-machine markets. CLIENT wholesales mobile airtime acquired from an offshore carrier in the United States through its offshore Network Operations Center ("NOC"). CLIENT's services are available both to customers in the U.S. and the market of its offshore carrier. The customers of CLIENT overwhelmingly resell CLIENT's airtime services (sic) the ultimate customers and, occasionally, a few customers use CLIENT's airtime services for internal applications within their business.

CLIENT purchases airtime and resells with value added services and has no tangible personal property located in Illinois. CLIENT sells its services through its offshore executive team, and by partner referrals. It has no sales personnel within your jurisdiction.

The following questions are being directed to your attention.

INCOME TAX

CLIENT has no apparent taxable presence within Illinois. CLIENT has no tangible personal property located in the state and conducts no sales activities within the state. Does the presence of a resale customer create a taxable presence within Illinois?

RULING

The determination whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the

Department does not issue rulings regarding whether a taxpayer has nexus with the State. For information regarding nexus, see Department of Revenue Regulations Section 100.9720 (accessible from the Department's web site). In any event, that a taxpayer has a customer located in Illinois does not reveal any particular facts about the taxpayer's activities in the state that would allow a nexus determination to be made.

In addition, the following general information may be provided.

The United States Constitution restricts a state's power to subject to income tax foreign corporations and other nonresidents. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction the state seeks to tax. (*Quill Corp. v. N. Dakota*, 504 U.S. 298 (1992)) The Commerce Clause requires that a state's tax be applied only to activities with a substantial nexus to the taxing state. (*Id.*) In the case of foreign corporations, Illinois may assert nexus to tax unless the corporation falls under the protection conferred by Public Law 86-272. (15 U.S.C. § 381) Public Law 86-272 precludes any state from subjecting a nondomiciliary corporation to a net income tax where such corporation's only activities within the state for the taxable year consist of solicitation activities for sales of tangible personal property.

As a general rule, the Department interprets the concept of nexus as broadly as possible. Where any part of a nonresident taxpayer's income is allocable to Illinois under Article 3 of the Illinois Income Tax Act ("IITA" ; 35 ILCS 5/101 *et seq.*), unless protected under P.L. 86-272, the Department will assert jurisdiction to tax.

Section 502(a) of the IITA sets forth the requirements for filing Illinois income tax returns. That section states in pertinent part as follows:

- (a) In general. A return with respect to the taxes imposed by this Act shall be made by every person for any taxable year:
 - (1) For which such person is liable for a tax imposed by this Act, or
 - (2) In the case of a resident or in the case of a corporation which is qualified to do business in this State, for which such person is required to make a federal income tax return, regardless of whether such person is liable for a tax imposed by this Act.

Under this section, a nonresident must file an Illinois income tax return if it incurs a liability for tax imposed under Section 201 of the IITA, or in the case of a corporation qualified to do business in Illinois, if it is required to file a federal return (regardless of whether is liable for Illinois tax). A nonresident is liable for Illinois income tax under Section 201 if it computes "Illinois net income" as defined under IITA Section 202. IITA Section 202 defines Illinois net income as that portion of the taxpayer's "base income" as defined in Section 203, which is allocated or apportioned to Illinois under the provisions of Article 3 of the IITA, less certain deductions. The above provisions may be accessed from the Department's web site.

IITA Section 304 provides for taxable years ending on or after December 31, 2000 that the apportionment factor for a nonresident deriving business income from Illinois and one or more other states (other than an insurance company, financial organization, or transportation company) shall be equal to its sales factor. Section 304(a)(3)(A) defines the sales factor as a fraction, the numerator of

which is the total sales of the person in Illinois during the taxable year, and the denominator of which is the total sales of the person everywhere. Department of Revenue Regulations Section 100.3700(c)(1) states that gross receipts from sales of tangible personal property are allocable to Illinois for sales factor purposes if the property is delivered or shipped to a purchaser within this State, regardless of f.o.b point or other conditions of sale. Regulations Section 100.3370(c)(3) provides that gross receipts from sales other than sales of tangible personal property are allocable to Illinois if the income-producing activity that gave rise to the receipts is performed wholly in Illinois, or the income-producing activity is performed in Illinois based on costs of performance. The above provisions may be accessed from the Department's web site.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you wish to obtain a PLR which will bind the Department, please submit a request conforming to the requirements of 2 Ill. Adm. Code § 1200.110(b).

Sincerely,

Brian L. Stocker
Associate Counsel (Income Tax)